Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of The United States

DANIEL RICHARD VAUGHEN,
Petitioner

v.

THE FLORIDA BAR,
Respondent

On Petition For Certiorari To The
Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

DANIEL RICHARD VAUGHEN
In Pro Persona
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QUESTION PRESENTED

Whether the Florida Supreme Court, by approving without comment, a court-appointed referee's report finding petitioner guilty of professional misconduct, notwithstanding the referee's failure to apply the correct evidentiary standard, notwithstanding his failure to enforce the discovery rules, notwithstanding his erroneous pretrial orders, notwithstanding his failure to permit evidence in mitigation, notwithstanding his violation of the code of judicial conduct, notwithstanding the failure of his final report even to mention, much less address, a single witness or argument presented by the petitioner, notwithstanding his partiality toward The Florida Bar, notwithstanding that when Petitioner complied with one Rule comment, he was prosecuted for violating a conflicting comment to another rule, notwithstanding the admission of bar trial counsel on the record that petitioner was "damned if he did and damned if he didn't," notwithstanding the express statement by bar trial counsel on the record that she did not personally join in the bar's recommended discipline, and notwithstanding the recommendation of bar trial counsel and her supervisor that the entire prosecution be dismissed, with each party to bear their own costs, and further, whether the Florida Supreme Court, by denying petitioner the right to present oral argument in support of his brief raising those issues, has, in each and every one of these respects, severally or cumulatively, denied Petitioner that due process of law guaranteed him by the Fifth and Fourteenth Amendments to the Constitution of the United States.

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PETITION FOR WRIT OF CERTIORARI

Daniel Richard Vaughen respectfully petitions for a Writ of Certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The decision of the Florida Supreme Court is unreported. It is set forth in Appendix A. The Final Report of The Referee is unreported. It is set forth in Appendix B. The decision of the Florida Supreme Court on Petitioner's Motion For Rehearing is unreported. It is set forth in Appendix C.

JURISDICTION

The Florida Supreme Court rendered the decision sought to be reviewed on January 6, 2004. It denied rehearing on March 25, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Article VI, Paragraph Second, of the United States Constitution provides: "This Constitution, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V of the United States Constitution provides: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; . . .".

Section 1, Sentence Two, Clause 2, Amendment XIV of the United States Constitution provides: . ". . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .".

Rule 3-7.6, ***Rules of Discipline***, Rules Regulating The Florida Bar: Procedures Before A Referee (Full Text in Appendix G)

Rule 4-1.7, ***Rules of Professional Conduct***, Rules Regulating The Florida Bar: Conflict Of Interest; General Rule (Full Text in Appendix H)

Rule 4-1.13, ***Rules of Professional Conduct***, Rules Regulating The Florida Bar: Organization As Client (Full Text in Appendix I)

Canon 3, ***Code of Judicial Conduct***, Comment to Canon 3B7 (Full Text in Appendix J)

STATEMENT OF THE CASE

Petitioner is an attorney admitted in Florida in 1964. He was admitted to the Bar of this Court in 1969.

A Florida Bar Inquiry/Complaint Form against Petitioner, un-sworn, but purportedly signed "under penalties of perjury" by one Helen Morton, was received by The Florida Bar on August 7, 2001. A copy is attached as Appendix D. Petitioner filed his response to that complaint, as required by Rule 4-8.4(g), ***Rules of Professional Regulation***. After a grievance committee hearing, which Petitioner was not permitted to attend, a formal Florida Bar Complaint against Petitioner was served on May 17, 2002 (Attached as Appendix E). On June 19, 2002, the Florida Supreme Court appointed a Referee.

After the denial of Petitioner's motions directed to the formal complaint, motion for summary judgment, motions seeking discovery, and petition for certiorari to the Florida Supreme Court, a final hearing was held before the Referee on March 12, 2003. It continued on March 20, 2003. The Referee's Final Report was rendered on March 24, 2003 (Appendix B). Petitioner timely served a Petition For Review in the Florida Supreme Court on May 19, 2003.

Petitioner and Respondent filed briefs with the Florida Supreme Court regarding the Referee's Final Report. In his briefs, Petitioner expressly raised the due process issues presented in this Petition. Petitioner's request for oral argument was denied. On January 6, 2004, the Florida Supreme Court approved the Final Report of the Referee without opinion or comment upon any of the issues raised in the briefs, directed that Petitioner be publicly reprimanded, and entered judgment against Petitioner for costs (Appendix A).

In his Motion For Rehearing, Petitioner underscored the due process issues previously raised in his briefs, and upon which this Petition for Writ of Certiorari is based. Petitioner's Motion For Rehearing is attached as Appendix F. Petitioner's Motion For Rehearing was denied without opinion or comment (Appendix C).

REASONS FOR GRANTING THE WRIT

There was absolutely no basis for Petitioner's prosecution for professional misconduct in this case. That is why, when she finally understood the facts and the law, the bar trial counsel, joined by her supervising attorney, in the Orlando, Florida, regional office of The Florida Bar jointly recommended to the Staff Counsel of The Florida Bar in Tallahassee, that Petitioner's prosecution be dismissed with prejudice, both parties to bear their own costs.

To everyone's shock and surprise, the Staff Counsel rejected that recommendation, and ordered the prosecution to proceed. That is why the bar trial counsel felt it necessary to state on the record at the final hearing that she was not personally recommending that Petitioner be publicly reprimanded for his conduct in this case.

Why did The Florida Bar continue this prosecution notwithstanding the recommendation to the contrary of its trial counsel and her supervising attorney?

Perhaps the explanation is that the legal profession has come under unprecedented attack in Florida. The Florida Bar continues to strive mightily to overcome an extremely negative public perception of the character and role of attorneys in society. Their "quick fix" of cranking out a high volume of professional disciplinary cases has not satisfied the public. That high volume of disciplinary cases, prosecuted for the sake of high volume, has only provided more justification for the negative public perception of the legal profession. Yet The Florida Bar persists in following that strategy.

More is at stake in this case than would at first blush appear. The consequences of a public reprimand for the Petitioner are likely to be severe: an end to his teaching career. More importantly, however, this case provides ample evidence that Florida's system of attorney discipline is broken.

Serious and long-term damage to the legal profession (and ultimately to the administration of justice) in Florida will likely result if that system remains unchallenged and unchanged.

Highlighting the requirements of due process in the discipline of attorneys will shed light on attorney discipline throughout the United States, leading to improved attorney performance and morale, while at the same time increasing public confidence in the legal profession and the administration of justice nationwide.

This case, therefore, provides an opportunity for This Honorable Court to state clearly to the legal profession, and to the public, that while it is committed to the discipline of those attorneys who deserve it; to the removal from the legal profession of those attorneys who fail to meet its high standards; it is equally committed to securing for attorneys the same rights guaranteed by our Constitution to us all.

THE FLORIDA DISCIPLINARY PROCESS IN THIS CASE DEPRIVED PETITIONER OF THE DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

"The fundamental requisite of due process of law is the opportunity to be heard." ***Grannis v. Ordean***, 234 U.S. 3854, 34 S.Ct. 779 (1914). The hearing, moreover, must be a real one, not a sham or a pretense. ***Moore v. Dempsey***, 261 U.S. 86, 43 S.Ct. 265 (1923).

In ***Moore v. Dempsey***, the trial was held to be a sham because of the pressure of a lynch mob. A review of the transcript and record of the proceedings in this case will lead the reviewer to the same conclusion: the hearing was a sham; not because of the pressure of a lynch mob, but because of the pressure of time and caseloads.

The Referee in this case was a sitting County Judge with little or no experience in civil trial practice, or in the areas of law out of which the complaint arose, pressured by an overwhelming caseload in busy, metropolitan, Jacksonville/Duval County, Florida, and threatened by the imminent deployment of his Florida National Guard unit to Iraq.

The Florida Supreme Court was pressured by caseloads exacerbated by its long-running funding dispute with the Florida legislature.

The Florida Bar was pressured by its perceived need to demonstrate to an unfriendly Florida legislature that it was better able than the legislatively-created Department of Professional Regulation to handle the discipline of Florida attorneys.

All of this pressure compressed the "costly and inefficient" requirements of due process into "assembly line process;" a process bearing little resemblance to that foundational concept. ***See***: ***Robbins v. Robbins***, 429 So.2d 424 (Fla. 3d DCA 1983) (assembly line procedures for handling child support contempt hearings violated constitutional due process). Due process, in the context of Florida attorney discipline, is now given little more than "lip service."

Here are a few of the due process violations present in this case:

1. The Referee's findings were not supported by clear and convincing evidence. Florida law is clear that findings of professional misconduct by attorneys must be supported by "clear and convincing evidence." ***Florida Bar v. Rayman***, 238 So.2d 594 (Fla. 1970); ***The Florida Bar v. Schonbrun***, 257 So.2d 6 (Fla. 1971); and ***The Florida Bar v. Quick***, 279 So.2d 4 (Fla. 1973). Nowhere in his Final Report did the Referee find that the evidence on which his findings of guilt were based met that standard.

In ***The Florida Bar v. Rayman***, 238 So.2d 594 (Fla. 1970) the Florida Supreme Court quoted with approval from

an opinion that a charge of unprofessional conduct must be sustained by more than the *testimony* of just one witness. The prosecution in the instant case rested upon an uncorroborated Inquiry/Complaint form purportedly signed by Helen Morton, without testimony or affidavit from *any* witness.

In ***The Florida Bar v. Schonbrun***, 257 So.2d 6 (Fla. 1971), the Florida Supreme Court said the evidence was not "clear and convincing" where the testimony of expert witnesses was in conflict.

In the instant case, the opinion of the experts unequivocally supported *Petitioner's* conduct. *No expert testimony to the contrary was offered by The Florida Bar.*

Compare: In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968)("a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical *if responsible attorneys would differ in appraising the propriety of that conduct.*") (Opinion of Justices White and Marshall, JJ) [Emphasis Supplied]

2. ***The Referee did not address Petitioner's evidence or issues of law.*** The Referee made no reference in his Final Report to *any* witness, affidavit, evidence or issue presented by the Respondent in his defense, the comment to Rule 3-7.6, ***Rules of Discipline***, to the contrary, notwithstanding: "The referee's report should list and address each issue in the case and cite to available authority for the referee's recommendations concerning guilt and discipline."

Petitioner introduced supporting affidavits from attorneys who were experts in the fields of law out of which the complaint arose. Those affidavits established that under the undisputed facts in this case, Petitioner was not guilty of professional misconduct. The Florida Bar introduced *no* testimony to the contrary, much less any expert testimony to the contrary. The Referee did not even *mention* the expert witness affidavits in his Final Report.

The Referee professed to be very impressed with the testimony of Petitioner's character witnesses. In his Final Report, however, he did not even mention that Petitioner had presented character witnesses, much less refer or respond to their testimony.

The Referee was in too much of a hurry to permit Petitioner to present all of his evidence in mitigation before rendering his Final Report. His Final Report was simply a "rubber stamp" of the proposed form provided him on disk by The Florida Bar. He printed and signed it without a single change.

3. ***Petitioner was prosecuted for violating a comment to the Rules of Professional Conduct.***

The Florida Bar argued that Petitioner's actions in an Estate violated an unsupported comment it wrote to Rule 4-1.7 of the Rules of Professional Conduct: "In Florida, the personal representative is the client rather than the estate or the beneficiaries."

That comment has neither been approved nor adopted by the Florida Supreme Court, and is contrary to the law of Florida.

The issue in the disciplinary case was to whom does the attorney for the estate owe primary professional responsibility when the personal representative violated her sworn legal and fiduciary duties; when she acted contrary to the interests of the estate and its creditors?

A clear analogy may be drawn from the professional responsibility of an attorney for an organization when a "constituent" of that organization violates fiduciary or legal duties to that organization. It is well established that under such circumstances, the attorney's primary professional responsibility is to the organization, and not to the defalcating "constituent." Rule 4-1.13(b), ***Rules of Professional Conduct***; ***See: The Florida Bar v. Brown***, 790 So.2d 1081 (Fla. 2001); ***Chaiken v. Lewis***, 754 So.2d 118 (Fla. 3rd DCA

2000); ***Kaplan v. Cowan Liebowitz & Latman, P.C.***, 832 So.2d 138 (Fla . 3rd DCA 2002) footnote 2.

While there are no cases in Florida establishing that principle in the context of estate administration, the applicable statutes and rules clearly treat the estate as a legal entity separate from the personal representative, much the same as an organization is a legal entity separate from its "constituents" in Rule 4-1.13. **See**: §733.540(9), **Fla. Stats.** (2002); §733.619(4), **Fla. Stats**. (2002); §733.705(3), **Fla. Stats**. (2002); §733.702, **Fla. Stats**. (2002); §733.702(4), **Fla. Stats**. (2002); §733.710, **Fla. Stats**. (2002); **See also: Fla. Prob. R.** 5.120(a), 5.320, 5.430, and 5.440.

The personal representative employs counsel for the estate, and its "constituents", to wit, the personal representative, heirs, beneficiaries, creditors, and the like. Under Florida law, counsel for the personal representative has an attorney-client relationship with the *estate,* not the personal representative, as claimed in the Bar's comment to Rule 4-1.7. ***See***: ***Steinway v. Bolden***, 185 Mich. App. 234, 460 N.W. 2d 306 (Mich. App. 1990 ("We conclude that the clear intent of the Revised Probate Code and of the court rules is that, although the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative.")

Reasoning from its wholly unsupported comment, however, The Florida Bar argued that Petitioner was *ethically* required: (a) to keep silent about a title defect in the Estate's real estate transaction, (b) to keep silent about the personal representative's false tax return filed with the Florida Department of Revenue, (c) to accept without complaint or response the personal representative's breach of Petitioner's fee agreement, (d) to return to the personal representative upon demand the escrow deposit from the estate's real estate transaction, the last Florida asset remaining in the jurisdiction of the probate court, (e) to fail to pay the Estate's

creditors (including himself), (f) to silently withdraw from any further representation of the Estate or its creditors, and (g) to ignore his obligation as an officer of the court to assist the probate court in the orderly closing of the Estate.

If Respondent had done what The Florida Bar argued that he was *ethically* required to do, and if a later investigation happened to uncover a major tax evasion, or elder abuse, or if litigation were to be commenced against the personal representative by the purchaser of the Estate lots, or by the former record title holders of the Estate lots, arising out of the undisclosed title defects, Respondent would have been exposed to criminal prosecution for aiding and abetting a felony, or for failing to protect an elderly client he had reason to believe might be a victim, or to civil liability for failing to protect the personal representative from claims arising out of the real estate transaction, or to disciplinary prosecution by The Florida Bar for incompetence, or for failing to fulfill his obligation to the estate or to the court as an officer of the court. ***See: The Florida Bar v. Brown***, 790 So.2d 1081 (Fla. 2001) (attorney who represented corporation prosecuted for not reporting to the corporation that its President was engaged in an illegal political campaign contribution scheme.)

Under the Florida Bar's unsupported comment, for the violation of which Petitioner was found guilty of professional misconduct, Petitioner was "damned if he does and damned if he doesn't," ***a fact expressly acknowledged by Bar Counsel.***

Compare Rule 4-1.13, Rules of Professional Conduct, and its comment: ". In an extreme case it may be necessary for the lawyer to refer the matter to the organization's highest authority."

This was an extreme case, and that is exactly what Petitioner did: he sought instructions from the probate court [the Estate's highest authority], and followed those instruc-

tions. His "reward" for complying with the comment to Rule 4-1.13 was a prosecution by The Florida Bar for professional misconduct for violating its comment to Rule 4-1.7: damned if he did; damned if he didn't.

4. ***Petitioner was not given adequate notice of the charges against him.*** The formal Bar Complaint failed to comply with Rule 3-7.6(g)(1)(B), of the ***Rules of Discipline***: "The complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined."

The formal Bar Complaint made no attempt to relate its allegations of fact to its "shotgun" concluding paragraph that Petitioner had somewhere, somehow, in the preceding 18 paragraphs violated 18 of the Rules of Professional Conduct (See Appendix E). Petitioner was accordingly unable to determine which of the alleged facts supported violations of which of the listed rules, a violation not only of the quoted Rule of Discipline, but also of the procedural due process notice requirements of the Florida and United States Constitutions. ***See: In re Ruffalo***, 390 U.S. 544, 88 S.Ct. 1222 (1968) ("The absence of fair notice as to the . . . precise nature of the charges deprived petitioner of procedural due process."), *modified on other grounds*, 392 U.S. 919, 88 S.Ct. 2257 (1968).

5. ***Petitioner was denied discovery essential to the preparation of his defense***. Petitioner made every possible effort after the filing of the formal complaint to obtain additional facts or, in the alternative, an explanation how the undisputed facts in the case supported the allegations being made against him, including filing a petition to the Florida Supreme Court for certiorari review of the Referee's adverse discovery rulings. The Florida Bar successfully resisted all of Petitioner's efforts to gain that information.

The Florida Bar refused to disclose its theory of the case until the day of the final hearing. The Florida Bar refused to disclose *what* evidence it would present at the final

hearing, and *how* it contended that evidence supported the allegations of its formal Complaint. That strategy prevented Petitioner from preparing an adequate response to the Bar's highly selective and one-sided presentation.

The discovery rules were designed to prevent a "trial by surprise." The Referee, and the Florida Supreme Court, permitted The Florida Bar to stage a "trial by surprise." The Florida Bar's strategy effectively denied Petitioner due process of law.

6. ***Petitioner was denied the opportunity to present evidence in mitigation***. The Referee terminated the hearing without allowing Petitioner to complete his presentation on mitigation.

7. ***The Referee was not impartial, and did not conduct an impartial hearing***. The Referee granted and, on motion for rehearing or clarification, re-granted a "Motion To Waive Defenses," a nullity under Florida law, and then permitted The Florida Bar to use that order to evade discovery. The Referee summarily denied Petitioner's motions to compel discovery without giving even giving Petitioner an opportunity to argue his motions.

At Final Hearing, the Referee permitted Bar Counsel to convert a written "opening statement" into a written final argument, over Petitioner's objection, overruled Petitioner's motion to strike or disregard that written Opening Statement/Final Argument as evidence, and then ultimately admitted that written Final Argument into evidence over Petitioner's objection.

The Referee denied Petitioner's motion for continuance of the Final Hearing made after Bar Counsel read that lengthy written opening statement/final argument to the Referee; a statement which revealed *for the first time* how The Florida Bar believed the "facts" alleged in the formal Complaint related to the alleged rule violations.

The Referee denied Petitioner an opportunity to reply to that written opening statement/final argument.

The Referee placed no limitations on Bar Counsel's presentation of her case, while severely restricting Petitioner in the presentation of his case.

The Referee allowed Bar Counsel to introduce 72 documents into evidence as a composite exhibit, over Petitioner's objection that it was a highly selective, one-sided, out-of-context excerpt of voluminous correspondence and emails.

The Referee then required Petitioner to review that voluminous 72 document exhibit over the lunch break and make any objections to it immediately thereafter.

The Referee required Petitioner to submit any correspondence and email that Petitioner claimed was missing from that voluminous 72 document exhibit, tabbed so as to correspond with the tab numbers used by Bar Counsel, "the sooner the better" after the Final Hearing.

During Petitioner's presentation of his case, the Referee repeatedly interrupted, cross-examined, and argued with the Petitioner.

Just before going off the record for the last time, the Referee attempted to pressure Petitioner to negotiate a plea agreement, saying:

> "I'm just asking, before I leave here, are you in a position to negotiate considering The Bar has used up a great deal of resources, woman-power, time, energy, money, court reporting fees, and so on and so forth? You would have to take into consideration you're not in as strong a bargaining position as you were in initially, is there a scenario that you can work it out at this point?"

The Referee accepted a proposed Final Report from Bar trial counsel without affording Petitioner an opportunity to prepare and present a proposed Final Report, in violation of the comment to Canon 3B7 of the ***Code of Judicial Conduct***[1]. The Referee then signed the Bar's proposed Final Report without alteration.

Despite his expressed respect for Petitioner's character witnesses, the Referee made no reference whatsoever even to their appearance as witnesses, much less to their testimony, in his Final Report. ***Compare***: ***The Florida Bar v. Rayman***, 238 So.2d 594 (Fla. 1970):

> All of these distinguished jurists declared their full and total confidence in the reliability and integrity of the respondents; and *while, of course, such attestations are not controlling in disciplinary matters of this kind, they are deserving of serious consideration as we perform the delicate function of reconciling the conflicts of evidence such as those found in this record.* [Emphasis supplied]

In his Final Report, the Referee made absolutely no reference to any issue, document, witness, affidavit, evidence or argument offered or presented by Respondent.

8. ***At no time was Petitioner afforded the opportunity to be heard by the Florida Supreme Court, the only court with the power to determine the merits of the case.*** Petitioner's petition for certiorari to the Florida Supreme Court to review the adverse discovery rulings of the Referee was denied. Petitioner's request for oral argument on the is-

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[1] A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

sues raised by his briefs was denied. The Final Report of the Referee was approved without opinion or comment. Petitioner's Motion For Rehearing was denied without opinion or comment. Petitioner has no right of appeal from the decision of the Florida Supreme Court in a disciplinary proceeding, the only court with jurisdiction over the merits of the case.

The U.S. Court of Appeals for the Eighth Circuit refused to suspend an attorney from practice before it, after its review of state court proceedings remarkably similar to those in this case, in which that attorney had been suspended from practice in the state court. ***In re Noell***, 93 F.2d 5 (8th Cir. 1937). Noting that only exceptions to the commissioner's report in that case had been filed with the court, and that no briefs had been filed in that court until after a motion for rehearing of that court's order overruling those exceptions, the Eight Circuit declined to recognize that procedure as sufficient to justify the removal of that attorney from its rolls.

It is submitted that merely calling the Petitioner's submissions to the Florida Supreme Court after the filing of the Final Report of the Referee "briefs" instead of "exceptions," (the term used in ***Noell, supra)*** is a distinction without a difference; it elevates the "form" of due process over the substance of due process.

In ***Mildner v. Gulotta***, 405 F. Supp. 182 (U.S.D.C. E.D.NY 1976), ***aff'd*** 425 U.S. 901, 96 S.Ct. 1489 (1976), a three judge panel of the district court dismissed on absention grounds three civil rights actions challenging attorney disciplinary procedures in New York State. The majority stressed and relied upon the fact that the constitutional issues presented in those actions could and should have been presented by appeal from the State court to the United States Supreme Court [a remedy that has since been legislatively removed].

In a thorough and very strong dissent, District Judge Weinstein argued that the procedures followed in New York,

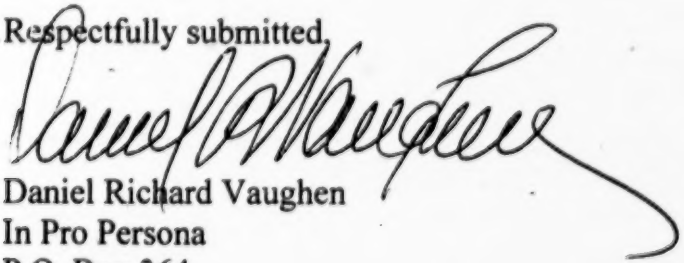
which were similar to the procedures followed in the instant case, clearly violated constitutional due process.

The deprivation of due process in the instant case, however, was not just inherent in Florida's disciplinary process. It was flagrant, extreme and pervasive. Petitioner was not afforded adequate notice, an impartial Referee, any semblance of a fair hearing, or any meaningful opportunity to present his case to the only court with jurisdiction to hear and decide it.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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